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8 UNITED STATES BANKRUPTCY COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN JOSE DIVISION

11 In re:) Case No.: 04-53874-ASW
12)
13 EXCEL INNOVATIONS, INC.,) Chapter 11
14)
15 Debtor.) OBJECTIONS TO FIRST INTERIM
16) APPLICATION FOR
17) COMPENSATION AND
18) REIMBURSEMENT OF EXPENSES
19) BY ATTORNEY FOR DEBTOR
20)
21) Date: December 7, 2010
22) Time: 1:15 p.m.
23) Courtroom: 3020
24) Judge: Arthur S. Weissbrodt
25)
26)

20 Creditor, Stanley Caplan ("Caplan"), hereby submits his Objections to
21 the First Interim Application For Compensation And Reimbursement of
22 Expenses By Attorney for Debtor (the "Fee Application").

23 I. INTRODUCTION

24 In the Fee Application, the firm of Campeau Goodsell Smith (the
25 "Applicant") requests compensation of \$953,409.00 in fees and \$11,589.27 in
26 costs. The amounts requested in the Fee Application exceed what will be

1 recovered in settlement proceeds, assuming the Court approves the
2 compromise of controversy between and among the Debtor, YT Technology,
3 and Ned Hoffman. Stanley Caplan is the holder of a \$192,000
4 Administrative Claim for his continued employment post-Petition as Debtor's
5 President and Chief Executive Officer. Caplan vehemently objects to the Fee
6 Application on multiple grounds and at a minimum, requests that the Court
7 defer ruling on the Fee Application until all professional fee applications and
8 administrative claims have been filed and approved.

9
10 In the alternative, Caplan requests that if the Court is inclined to
11 grant the Fee Application, then Caplan should also receive, at the same time,
12 a pro rata portion of his administrative claim. Finally, Caplan contends that
13 the submission of this Fee Application is one more compelling reason for why
14 the Court should exercise its broad, discretionary powers to convert this case
15 to Chapter 7.

16 **II. ARGUMENT IN SUPPORT OF OBJECTIONS**

17 **A. The Amount Requested in the Fee Application regarding 18 the Patent Litigation Is Excessive**

19 For several years, Caplan served as Debtor's President, Chief Executive
20 Officer, and Board Director, and obtained first-hand knowledge of the services
21 provided by Applicant. See Declaration of Stanley Caplan filed concurrently
22 with these Objections ("Caplan Decl."). In May 2004, the District Court
23 granted a motion for summary judgment against Debtor, ruling that Debtor
24 did not own the patents at issue. See Caplan Decl. at ¶ 2. The District Court
25 subsequently granted terminating sanctions against Debtor and Ned
26 Hoffman. See Caplan Decl. at ¶ 2. In addition, the patent litigation firm of
Knobbe, Martens, Olson & Bear LLP ("KMOB") had already attempted FRCP

1 Rule 54 certification four different times and was denied each time. In light
2 of these adverse rulings, it became clear to Caplan that further litigating the
3 patent case could only be justified on a contingency-fee basis. See Caplan
4 Decl. at ¶ 2. Caplan doesn't have the resources to further evaluate or
5 investigate the legal invoices submitted with the Fee Application, but the
6 bottom line is that Applicant's pursuit of the patent litigation (category A3 of
7 the Fee Application) came at a cost of \$483,842. The work performed by
8 Applicant was not of value to the estate, and given the District Court rulings
9 that went against Debtor in connection with the summary judgment
10 proceedings in 2004, Applicant respectfully asks the Court to deny, or at least
11 significantly reduce, the almost \$483,842 spent on this litigation.
12

13 **B. The Court Should Deny Fees in Connection with the**
14 **Turnover Litigation Because Applicant Was Never**
Approved as Special Counsel

15 On March 24, 2005, Applicant was retained by Court Order to serve as
16 Debtor's general bankruptcy counsel. See Docket No. 305. In Applicant's own
17 words, it "thereafter persuaded Silicon Valley Law Group (SVLG) to act as
18 special counsel to prosecute the Stock Proceeds Turnover Litigation." See Fee
19 Application, Docket No. 716 at page 6:7-8. When attorney Gregory Charles
20 left SVLG in March 2007 and joined the Applicant, the Applicant
21 "substituted itself for SVLG as record counsel in the turnover litigation." See
22 Fee Application, Docket No. 716 at page 6:10-11. However, Applicant did not
23 seek the authority of this Court to be retained as special counsel or to act as
24 litigation counsel. Upon information and belief, it appears that Applicant did
25 nothing more than simply file a Substitution of Counsel in which it
26 announces, without Court approval, that the Debtor "hereby relieves" SVLG

1 (which had previously been Court-approved to serve as special counsel) and
2 instead appoints itself. See Adversary Proceeding No. 04-05217, Docket No.
3 122.

4 Caplan objects to the awarding of fees to a firm not properly employed,
5 and therefore requests that the Court deny the \$179,260.00 Applicant seeks
6 to recover as compensation in connection with this litigation.

7 **C. A Ruling on the Fee Application is Premature**

8 Applicant has presented a Fee Application that would swallow up the
9 estate's only asset. Caplan respectfully submits that it is therefore
10 premature to rule upon the Fee Application until all professional fees and
11 administrative claims have been filed. Caplan has a \$192,000
12 administrative claim for post-petition employment services and Applicant
13 has disclosed that it believes that SVLG will be submitting "a fee application
14 for about \$200,000 at a future point in time." See Fee Application, Docket
15 No. 716, at page 16:14-15. If the Fee Application is granted (even with
16 Applicant deferring 25% of its fees), there is not enough remaining to satisfy
17 Caplan's claim as well as the claims of other professionals and
18 administrative claimants. The Court should therefore defer ruling on the Fee
19 Application until all such claims and fee applications can be submitted and
20 reviewed.
21

22 **D. The Fee Application Begg for the Court to Sua Sponte**
23 **Convert this Case to Chapter 7**

24 At this point, it appears that the only purpose for Debtor remaining in
25 bankruptcy is to pay professional fees. The Debtor is not conducting any
26 business and no proceeds are coming in other than through the settlement the

1 Court is being asked to approve. Under such circumstances, the Court would
2 be justified to exercise its power under 11 U.S.C. section 105(a) to convert the
3 case to Chapter 7. Caplan contends that this is the proper outcome so that a
4 Chapter 7 trustee (who will have the financial resources to do so) can do the
5 analysis and investigation required to determine how to best apportion any
6 settlement proceeds.

7 E. **IF THE COURT IS INCLINED TO GRANT THE FEE**
8 **APPLICATION, CAPLAN SHOULD ALSO RECOVER A**
9 **PRO RATA PORTION OF HIS ADMINISTRATIVE**
10 **CLAIM**

11 Caplan is the holder of an administrative priority claim for providing
12 key services as President and CEO to the Debtor. See Claims Register,
13 Claim No. 15. The equities demand that if the Court grants any portion of
14 the Fee Application at the present time (Applicant is requesting 75% of fees
15 and 100% of costs), then Caplan be paid a proportionate percentage on his
16 administrative claim.

17 **III. CONCLUSION**

18 For the foregoing reasons, Caplan objects to Applicant's Fee
19 Application and respectfully requests that the Court deny, or at least defer
20 the Fee Application, in addition to converting this case to Chapter 7. In the
21 alternative, if the Court does grant the Fee Application, Caplan requests that
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26 ///

1 his administrative claim be paid at the present time pro rata with what the
2 Applicant is awarded.

3
4 Dated: December 2, 2010

LAW OFFICES OF WILLIAM C. LEWIS

5 By: /s/ William C. Lewis
6 William C. Lewis
7 Attorneys for Creditor,
Stanley Caplan
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